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ALEXANDER L. STEVAS,

No. 82-69

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

MID-AMERICA REGIONAL BARGAINING ASSOCIATION, CONTRACTORS ASSOCIATION OF WILL AND GRUNDY COUNTIES, RESIDENTIAL CONSTRUCTION EMPLOYERS COUNCIL, JOLIET CONSTRUCTION CO. and U.S. HOME CORPORATION,

Petitioners,

vs.

WILL COUNTY CARPENTERS DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO), COMMONWEALTH EDISON COMPANY and GUST K. NEWBERG CONSTRUCTION CO.,

Respondents.

RESPONSE OF GUST K. NEWBERG CONSTRUCTION CO. TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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SUMMARY OF ARGUMENT

It is clear from the facts alleged in the complaint that the agreement entered into between the respondents is exempt from the provisions of the Sherman Act (15 USC 1, etc.), and the Clayton Act (15 USC §§15 and 16) because the record amply reflects that the agreement entered into between the respondents was a collective bargaining agreement affecting wages to be paid to union members, and was not entered into with the purpose of destroying the business of any competitor of any respondent.

ARGUMENT

THE FACTS SET FORTH IN PLAINTIFFS' COMPLAINT DO NOT ALLEGE A VIOLATION OF THE ANTI-TRUST LAWS BY DEFENDANTS.

The complaint in the instant case and the characterization of its allegations in the Petition For Writ of Certiorari present an artful, but ineffective, attemp to plead a case falling within the

decisions of this Court in United Mine Workers v. Pennington, 381 US 657, and Connell Construction Co. v. Plumbers and Steamfitters Local 100, 421 US 616.

The objective facts alleged in plaintiffs' complaint are that there was a work stoppage in Will County, Illinois by the respondent Carpenters Union because of inability to agree on terms of a collective bargaining agreement. Plaintiff associations represented the majority of employers of carpenters in the County, but did not represent either respondent Newberg or Commonwealth Edison. Newberg, as general contractor, was constructing a nuclear energy generating plant for Edison. The carpenters struck Newberg, as well as other employers in the area. Newberg, with the approval of Commonwealth, entered into an Escrow Agreement with the Union by which Newberg agreed to pay, retro-

actively, the amount ultimately agreed upon in the collective bargaining agreement resulting from negotiations between plaintiffs and the Union and further agreed to place the sum of $2.25 per hour in escrow so that the funds to make whatever payment was ultimately agreed upon would be available.

It is difficult to think of a labor-employer relationship more in accord with ordinary business practices, or more clearly within the labor exemption to the Anti-Trust Law.

By several artfully chosen adjectives imputing all sorts of malicious motives to defendants, plaintiffs seek to bring themselves within United Mine Workers v. Pennington, 381 US 657; L.Ed. 2d 626, 85 S.Ct. 1585 and Connell Co. v. Plumbers and Steamfitters, 421 US 616, 44 L.Ed. 2d 418, 95 S.Ct. 1830.

Connell Co., supra, involved an agree-

ment totally outside the ordinary framework of collective bargaining in that the agreement made was between the Union and a general contractor who did not employ and did not plan to employ any members of the Union. Pursuant to the agreement the general contractor agreed not to subcontract work to subcontractors who did not employ union members. This Court found the agreement not to be exempt from inquiry because of the remoteness of the non-union party from the employer-employee relationship. In the instant case, Newberg is the employer and the union represents employees and the subject of the agreement is not a boycott but wages.

The major difference between the instant case and the factual context set forth in Pennington was that in the instant case the moving party in the negotiations between Newberg and the Union was the Union, with Newberg being "pressured"

to agree (Complaint 40A). In Pennington, the employer group was not pressured to act but was at least a co-leader in creating a framework under the guise of a labor agreement which would have the immediate, direct and intended purpose and result of eliminating competition for these employers:

> "One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy. This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry." (381 US pp. 665-666)

Here, as indicated, Newberg does not compete with the other employers. Commonwealth not only does not compete with the other employers but, as a public utility, does not compete with anybody.

As the Court of Appeals noted, Appendix to Petition, p. 15a, several Courts of Appeal have considered the elements which

will support a cause of action for conspiracy in spite of the exemption given to labor unions and collective bargaining agreements under the statutes (i.e., the statutory exemption) and the decisions of this Court reconciling the public policy expressed in the Sherman and Clayton Acts against combinations in restraint of trade, and the public policy in favor of protection of the right of labor to organize and bargain collectively (the non-statutory exemption). All of these courts have determined that predatory intent is an essential element of a cause of action under Pennington.

In Smitty Baker Coal Co. v. U.M.W., 620 F.2d 416 (Cert. Den. 449 US 870, 1980), the Fourth Circuit stated the elements required to be clearly alleged:

"It is thus manifest from this review of the pertinent authorities apply-

> ing the Pennington doctrine, on which the plaintiff relies for an antitrust conspiracy, that such doctrine requires (a) an agreement between the Union and the employer-group consisting of a substantial number of the larger employers in an industry to establish a wage scale for the employees-of-the-group-members-of-the Union, (b) which wage scale the Union and the employer group knew that the marginal employers in the industry could not afford, and (c) which wage scale the Union undertook to impose on the marginal nonmember operators, (d) with the intent to drive these marginal operators out of busines and to remove them as competitors of the employer-group."

In the instant case, element (a) is lacking in that it is clear that there is no employer group involved, nor are there a substantial number of employers involved. Indeed, the employer group is the plaintiff. Elements (b) and (c) are arguably present at the pleading stage but, if the Complaint is examined in recognition of the distinction between Pennington and the instant case as respects element (a), it will be seen

that (b) and (c) are also lacking because there is no allegation of a division into wealthy and marginal contractors in the Will-Grundy County areas. Element (d) is not met because there is no allegation that it was the intent of Newberg or Commonwealth Edison to drive plaintiffs out of business. Indeed, since the plaintiffs' members hire the majority of members of the union in the affected area, such a purpose could not reasonably be ascribed even to the Union.

Plaintiffs seem to make a further argument that, even if there is a labor exemption and even if this exception would apply where the agreement attacked is a collective bargaining agreement covering only the classic bargaining point of such an agreement, wages, the exemption is removed where one who is neither employer nor employee becomes a party to the agreement. We submit that

such a contention is patently ridiculous where, as here, the third party, Commonwealth Edison, is the one who is paying the bill because it will bear the additional costs incurred by Newberg in paying the higher wage scale. Connell Co., supra, so heavily relied upon by plaintiffs to establish the point that lack of a direct employer-employee relationship between the parties to an agreement under attack nullifies the exemption, involved a non-labor party who was in no way involved with the union and who made the agreement in order to restrain competition among those who would properly negotiate collective bargaining agreements with the union, none of which were involved in the contract.

Here, since Commonwealth Edison was the party which ultimately would bear the increased labor cost, its acquiescence in the agreement by Newberg to make pay-

ment could hardly disqualify this agreement from the exemption otherwise so clearly applicable.

CONCLUSION

It is therefore respectfully submitted that the decision of the Court of Appeals for the Seventh Circuit is manifestly correct and issuance of the Writ of Certiorari should be denied.

Respectfully submitted

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